Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors

HIGH COURT (KOTA KINABALU) — JUDICIAL REVIEW NO K25–19 OF 2006
HAMID SULTAN JC
5 JUNE 2007

Civil Procedure — Judicial review — Certiorari and prohibition — Application for leave — Whether threshold requirement for issuing met — Rules of the High Court 1980 O 53

Land Law — Acquisition of land — Acquisition for public purpose — To construct power plant — Generate and supply electricity power for the benefit of the public — Whether unlawful for State Government to compulsorily acquire land since beneficiary of acquisition was third respondent, a commercial corporation — Whether acquisition was for an improper purpose or made mala fide — Land Acquisition Ordinance (Cap 69) (Sabah) s 3 — Federal Constitution art 13

Statutory Interpretation — Public purpose — Whether comprehensive definition and encompass all heads of public purpose — Whether public benefits directly or indirectly — Whether public purpose criteria been satisfied — Land Acquisition Ordinance s 2

The applicant's land, situated in the district of Kota Kinabalu, was compulsorily acquired by the first respondent, pursuant to s 3 of the Land Acquisition Ordinance (Sabah Cap 69). The purpose for the compulsory acquisition of the said land was for the construction of a power plant to generate and supply electricity power. The applicant sought to declare inter alia, that the compulsory acquisition was done for an improper purpose in that it was to allow or permit the third respondent to construct a power station on the said land when, in fact, it was the obligation of the third respondent to obtain the requisite land to build the power station and for the second respondent to purchase the electrical energy generated and/or produced therefrom. Therefore the acquisition was for the benefit of the third respondent, and not a public purpose as a whole. Hence, the first respondent should not have acquired the land for the benefit of the second and third respondents.

Held, application dismissed with cost:

(1) The applicant's application and the argument put forward was misconceived, lacks legal jurisprudence, and was an attempt to scuttle a public interest project purely on monetary grounds and/or to put pressure on the concerned parties by way of this judicial review application, with knowledge that there would be substantial loss and damage to the second and third respondents (see para 41).

(2) Public purpose or use or benefit would necessarily include living persons, statutory bodies etc, which may obtain a benefit as any ordinary member of the public could have done. For example, electricity is necessary for the purpose of lighting the house as well as a factory belonging to a corporation. Both purposes whether house or factory must necessarily be seen as public purpose as it benefits the public. It could not by any stretch of imagination be argued that the ultimate user of electricity in this case was not the public (see para 41(c)).

[Bahasa Malaysia summary

Hartanah pemohon yang terletak di daerah Kota Kinabalu telah diperoleh secara wajib daripada responden pertama menurut peruntukkan s 3 Ordinan Pemerolehan Tanah (Sabah Cap 69). Tujuan pemerolehan wajib adalah untuk membina loji bagi menjana dan membekal tenaga elektrik. Pemohon telah memohon suatu deklarasi antara lain, bahawa pemerolehan wajib dilakukan untuk tujuan yang tidak sempurna dalam ianya membenarkan responden ketiga membina stesyen janakuasa di atas tanah tersebut apabila, yang mana ianya adalah kewajipan responden ketiga untuk mendapatkan tanah yang diperlukan untuk membina stesyen kuasa dan untuk responden kedua untuk membeli kuasa elektrik yang dijana dan/atau dikeluarkan melaluinya. Oleh yang demikian pengambilan tanah adalah untuk faedah responden ketiga dan bukan untuk kepentingan umum keseluruhannya. Oleh itu respondent pertama tidak seharusnya mengambil tanah tersebut bagi faedah responden kedua dan ketiga

Diputuskan, pemohonan ditolak dengan kos:

(1) Permohonan pemohon dan pernyataan yang dikemukakan adalah tidak berasas, ketiadaan nas undang-undang dan adalah suatu percubaan menghentikan suatu projek faedah umum berdasarkan alasan kewangan semata-mata dan/atau untuk menekan pihak berkenaan melalui aplikasi semakan kehakiman dengan mengetahui bahawa ianya akan membawa kerugian besar dan kemusnahan kepada responden kedua dan ketiga (lihat perenggan 41).

(2) Faedah, kegunaan atau kegiataan umum semestinya merangkumi manusia, badan berkanun dan lain-lain, yang boleh memperolehi faedah sebagaimana yang diperolehi rakyat umum. Sebagai contoh, elektrik adalah keperluan asas bagi menerangi rumah dan kilang kepunyaan perbadanan. Sama ada rumah ataupun kilang, ia semestinya dilihat sebagai kegiataan umum yang memberi faedah kepada masyarakat. Ianya tidak boleh disangkal melalui andaian bahawa pengguna elektrik dalam kes ini tidak terdiri daripada rakyat umum (lihat perenggan 41(c)).]

Notes

For cases on acquisition for public purpose, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1784–1786

For cases on judicial review generally, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 486–489.

For cases on statutory interpretation generally, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1618–1981.

Cases referred to

Ahmad bin Saman v Kerajaan Negeri Kedah [2003] 4 MLJ 705 (refd)

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750 (refd)

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (refd)

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228 (refd)

Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223 (refd)

Attorney-General of the Commonwealth v RT Co Pty Ltd; WH Blakeley & Co v Commonweatlh [1953] ALJ 672 (refd)

Castle Fitness Consultancy Pte Ltd v Mauz [1990] 1 MLJ 141 (refd)

Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (refd)

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (refd)

Datuk Syed Kechik bin Syed Mohamed v The Governments of Malaysia and Sabah [1979] 2 MLJ 101 (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35 (refd)

Galstaun & Anor v Attorney-General [1981] 1 MLJ 9 (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481 (refd)

Kerajaan Malaysia v Yong Siew Choon [2006] 1 MLJ 1 (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (refd)

Lau Koh Sing @ Lau Kok Sing v The Sabah State Government & Ors [1998] MLJU 135 (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)

M [1994] 1 AC 377 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1 (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)

Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd [2002] 1 MLJ 385 (refd)

O'Reilly v Mackman [1983] 2 AC 237 (refd)

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 (refd)

Pemungat Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35 (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & Anor Appeal [2002] 3 MLJ 72 (refd)

R v Barnesley MBC, Ex parte Hook [1976] 1 WLR 1052 (refd)

R v Cornwall County Council, ex parte Huntington and another [1994] 1 All ER 694 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
R v Secretary of State for the Home Department, ex parte Fayed and another [1997] 1 All ER 235 (refd)
Reg v Home Secretary, Ex p Bugdaycay [1987] 1 AC 531E (refd)
Reg v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 (refd)
Regina v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan [1993] 1 WLR 909 (refd)
Regina v Lord President of the Privy Council, Ex parte Page [1993] AC 682 (refd)
Regina v Ministry of Defence, Ex parte Smith [1996] QB 554D (refd)
Regina v Monopolies and Mergers Commission, Ex parte Argyll Group Plc [1986] 1 WLR 763 (refd)
Regina v Panel on Take-Overs and Mergers, Ex parte Datafin Plc And Anor [1987] 1 QB 815 (refd)
Regina v Rent Officer Service and Another, Ex parte Muldoon [1996] 1 WLR 1103 (refd)
Regina v Secretary of State for the Home Department, Ex parte Brind and Others [1991] 1 AC 696 (refd)
Regina v Secretary of State for the Home Department, Ex parte Doody [1994] 1 AC 531 (refd)
Rohana bte Ariffin v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)
Roy v Kensington and Chelsea and Westminister Family Practitioner Committee [1992] 1 AC 624 (refd)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204 (refd)
South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors [1980] 2 MLJ 165 (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)
Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johore [1979] 1 MLJ 49 (refd)
Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba [1998] 2 MLJ 372 (refd)
Tan Sri Eric Chia Eng Hock v Public Prosecutor [2007] 2 MLJ 101 (refd)
Tan Sung Mooi v Too Miew Kim [1994] 3 MLJ 117 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707 (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Berhad [1995] 2 MLJ 442 (refd)
United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12 (refd)
WDM [1995] 1 WLR 386 (refd)
Wheeler v Leicester City Council [1985] AC 1054 (refd)
Wijeyesekera v Festing [1919] AC 646 (refd)
William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1 (refd)

Legislation referred to

Courts of Judicature Act 1967
Electricity Supply Act 1990

Federal Constitution arts 4, 5(1), 8(1), 13
Interpretation and General Clauses Enactment 1963 s 3(1)
Land Acquisition Ordinance (Sabah Cap 69) ss 2, 3, 8(3), 14, 21
Rules of the Federal Court 1995 r 137
Rules of the High Court 1980 O 53
Supreme Court Act 1981 [UK] s 31

David Fung Yin Kee (Alex Pang & Co) for the applicant.
Roderic Fernandez (Mohd Hanafiah Mohd Kassim with him) (State Attorney-General and Legal Officer, Kota Kinabalu State Attorney General's Chambers) for the first respondent.
Halim Hanapia (Salleh, Datu Nasrun & Associates) for the second respondent.
Sugumar Balakrishnan (Sugumar & Co) for the third respondent.

Hamid Sultan JC:

[1] This is my judgment in respect of the application of the applicant to move the court, pursuant to O 53 of the Rules of the High Court 1980 ('RHC') seeking orders for certiorari and prohibition, etc.

[2] The applicant is the registered owner of a land at Telipok, in the district of Kota Kinabalu ('land'). The second respondent is jointly owned by the first respondent and Tenaga Nasional Berhad which is owned by Khazanah Sdn Bhd, the investment arm of the Federal Government. The third respondent is a concessionaire to built a power plant for the second respondent under the scheme 'build, operate and transfer' and after 21 years of operation to sell it to the second respondent for RM10 under a private power purchase agreement ('PPA').

[3] The applicant's land was compulsorily acquired by the first respondent, pursuant to s 3 of the Land Acquisition Ordinance (Sabah Cap 69) ('LAO') and had been gazetted according to the law. The gazette notification, inter alia, stated that … *acquired for a public purpose, that is to say for the construction of public utility that is power station, Kota Kinabalu.* Importantly to this case, the applicant before the acquisition was in negotiation with the third respondent for the sale of the said land, which did not materialise for valid reasons says the third respondent, which I will not elaborate for the purpose of this judgment though I have given proper consideration to the said issue. The applicant being dissatisfied with the acquisition, had on 21 November 2006 obtained leave from the court for this application and also an order for stay of all proceedings in the said acquisition. Thereafter, the third respondent was granted leave to intervene in the proceedings. When the matter first came before me for the hearing of application on 21 May 2007, the respondent's counsel urged the court to decide the application expeditiously as much money had been spent and the power plant project had come to a halt because of the stay. Besides, the parties agreed that the application can be dealt with by written submission, and I, accordingly gave the necessary directions and time for the written submission and fixed the matter for decision today.

[4] The applicant in his application is seeking for the following reliefs namely: (a) a declaration that the first respondent's decision and ensuing declarations and publications in the gazette on 28 September 2006 and 5 October 2006 under s 3 of the LAO stating that the said land should be acquired for a public purpose is unlawful, invalid and void; (b) an order of certiorari to quash the decision, declarations and publications in the said gazette for a public purpose, that is, the construction of public utility of a power station, Kota Kinabalu and all proceedings in relation thereto; (c) an order of prohibition directed to first and second respondents and any servants, officers, representatives, agents or independent contractors acting for or on their behalves prohibiting it or them from entering in, performing any work of excavation, levelling with any material, piling, installing or constructing any structures over or on the applicant's said land, etc with costs.

[5] The grounds upon which the reliefs are sought are as follows: (i) the applicant as registered owner of the said land is entitled to the protection under art 13 of the Federal Constitution; in consequence she should not be deprived of the said land save in accordance with law; (ii) the first respondent's decision and ensuing declarations under s 3 of the LAO purportedly is not one for a public purpose but is, in reality, for an improper purpose; (iii) the first respondent's said decision and declarations was and is for the improper purpose to acquire the said land for the second respondent, in order to allow or permit the third respondent, a private company limited by shares, to construct a power station on the said land; (iv) under the said PPA, inter alia, the second respondent and the third respondent had agreed that it is the obligation of the third respondent, and not that of the second respondent, to obtain the requisite land to build the power station and then for the second respondent to purchase the power generated by the third respondent at an agreed rate; and in consequence, the compulsory acquisition of the said land for the benefit the third respondent on whom the responsibility to obtain the said land lies, is an abuse of power and therefore an act that is unlawful, invalid and void; and (v) further or alternatively, the first respondent's exercise of power under s 3 of the LAO, together with the second respondent's assistance and abetment towards this purpose of compulsorily acquiring the said land is mala fide and therefore unlawful, invalid and void.

[6] In crux, the applicant complains that the acquisition was done for an improper purpose in that it was to allow or permit the third respondent to construct a power station on the said land when, in actuality, it was the obligation of the third respondent to obtain the requisite land to build the power station and for the second respondent to purchase the electrical energy generated and/or produced there from. Therefore the acquisition was for the benefit of the third respondent, and not a public purpose as a whole. Hence, the first respondent should not have acquired the land for the benefit of the second and third respondents.

[7] To be succinct, the first respondent's submission, inter alia, is that the second respondent is a 'hybrid-corporation', performing statutory functions and one jointly owned by the first respondent and Tenaga Nasional Berhad. The second respondent is charged with the duty to supply electrical power in the State of Sabah. There is no prohibition in law to perform this duty through independent power suppliers as was done in this case. The second respondent is the ultimate owner of the project under

A the PPA and will assume possession of it after 21 years. Therefore, the second respondent falls within sub-clause (e) of s 2, read with s 3 of the LAO and the acquisition is lawful.

[8] On the date of the hearing, the applicant had informed the court that the
B applicant had narrowed down the issue for determination to the question:

> Whether the first respondent has misconstrued the powers of acquisition under LAO in invoking its powers in s 3 to acquire the said land for the stated purpose in the declaration.

C **[9]** The applicant, inter alia, submits as follows: (i) s 3 empower the State Government to compulsorily acquire land for a public purpose only. Section 3(1) states:

> If the Yang di-Pertua Negeri considers that any land should be acquired for a public purpose he may cause a declaration to that effect to be made in the manner provided by this section
D and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose.

(ii) The manner of the acquisition was in breach of the protection granted in the Federal Constitution. For, a person's right to property is one of the fundamental liberties, guaranteed under art 13(1) which states: *No person shall be deprived of*
E *property save in accordance with law.* (iii) Notwithstanding the conclusive evidence clause in s 3(1), the decision and ensuing declaration is not justifiable as it was not done in accordance with law. The appellate courts had the occasion to look at a similar clause in the Land Acquisition Act 1960 namely s 8(3) in the following cases: *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johore* [1979] 1 MLJ 49 (PC); *S Kulasingam & Anor v Commissioner of Lands, Federal*
F *Territory & Ors* [1982] 1 MLJ 204 (FC); *Pemungat Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35 (FC); and *Ahmad bin Saman v Kerajaan Negeri Kedah* [2003] 4 MLJ 705 (CA). In the Federal Court decision of *Kulasingam & Anor*, Abdoolcader J (as he then was) said that (at p 211):

G > ... it may be possible to treat a declaration under s 8 as a nullity if it be shown that the acquiring authority has misconstrued its statutory powers or that the purpose stated therein does not come within s 3 or if bad faith can be established.

Further, Salleh Abas, CJ Malaya (as he then was) in the then Federal Court's decision in *Pemungat Hasil Tanah, Daerah Barat Daya, Pulau Pinang* held (at p 37):

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> We think that it is sufficient to decide this appeal on the basis of a simpler question, i.e. whether or not in view of the long delay resulting in an injustice to the land owner the acquisition was done in accordance with the Act (the Land Acquisition Act). Only in the circumstance that it is not done in accordance with the Act can we say that the acquisition is contrary to the requirement of clause (1) of Article 13 of the Federal Constitution which
I requires that to be lawful every deprivation of property must be done in accordance with law.

> Every exercise of statutory power must not only be in conformity with the express words of the Statute but above all must also comply with certain implied legal requirements. The court has always viewed its exercise as an abuse and therefore treats it as illegal where

> the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness (*de Smith's* (4th Ed) p 323; and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*).

In addition, Arifin Zakaria, JCA (as he then was) in *Ahmad bin Saman* opined (at pp 708–709):

> Thus, it would appear that the acquisition may be challenged on any of the following grounds:
>
> (a) that the acquiring authority has misconstrued the statutory powers;
>
> (b) that the purpose stated in the Declaration does not come within s 3;
>
> (c) where it can be shown that the acquiring authority has acted in bad faith; or
>
> (d) that the acquiring authority has acted contrary to the law.

(iv) The preamble of the Ordinance is clear; that is *To authorise the acquisition of land for public purposes.* 'Public purpose' is statutorily defined under s 2 of the Ordinance. Unless the context otherwise requires, 'public purpose' shall mean any or any combination of the defined following purposes stated in s 2. The public purpose relied on for the present land acquisition is sub-clause (e) of s 2, which states:

> ... for or in connection with any public utility undertaking or the provision of any public service, undertaken or provided, or about to be undertaken or provided, by the Government, the Federal Government, a local authority or any corporation incorporated directly by written law.

(v) Pursuant to s 2(e), this public utility undertaking must be embarked on or about to be embarked on *by the Government, the Federal Government, a local authority or any corporation incorporated directly by written law.* The compulsory acquisition of land for the purpose of a public utility undertaking under LAO does not envisage a body that does the public utility undertaking for its own interest of earning profits, profits which do not accrue to the public's benefit. Under the Interpretation and General Clauses Enactment 1963, which applies to interpret Ordinances of Sabah, at s 3(1), 'the Government' refers to the State Government of Sabah and 'written law' means all State law and Federal law. It is plain that the third respondent is not the State Government, the Federal Government, or a local authority as the third respondent is a private company, limited by shares and registered under the provisions of the Companies Act 1965. (vi) Where the statutory definition is clear and unambiguous, it cannot be ignored. In *Kerajaan Malaysia v Yong Siew Choon* [2006] 1 MLJ 1 where His Lordship, Augustine Paul, FJC opined (at p 11):

> As the definition is clear and unambiguous it cannot be ignored. As *Bindra's Interpretation of Statutes* (7th Ed) says at p 39:
>
> > When a Legislature defines the language it uses, its definition is binding upon the Court and this is so even though the definition does not coincide with the ordinary meaning of the word used. It is not for the Court to ignore the statutory definition and proceed to try and extract the true meaning of the expression independently of it (*Nand Rao v Arunachalam* AIR 1940 Mad 385). If the Legislature's intention is clear and unambiguous, it is obviously outside the jurisdiction of the court to correct or amend the definition in the interpretation clause (*Mordhwaj Singh v State of UP 24*).

(vi) Based on the facts and the applicable law that the first respondent had misconstrued the statutory language of s 3, read together with s 2's definition of 'public purpose' in the LAO, when it is decided to and thus declared to effect the compulsory acquisition of the said land. Since the statutory words were misinterpreted, the acquisition was also done for an improper purpose. In consequence, the first respondent's decision and declaration was not done in accordance with the law, and is a nullity and void. The remedy of certiorari is therefore required to quash the decision, declarations and publications and all proceedings in relation thereto.

[10] The first respondent summarises the grounds of the applicant succinctly into two issues namely; (i) it is unlawful for the State Government to compulsorily acquire the said land because the beneficiary of the said acquisition is the third respondent which is a commercial corporation, and (ii) the said compulsory acquisition is made mala fide.

[11] The first respondent, inter alia, submits as follows: (i) s 3 should be read together with s 2 of the LAO which defines public purpose to mean:

> 2. In this Ordinance, unless the context otherwise requires, the following expressions shall have the meanings hereby assigned to them –
>
> … 'public purpose' means any, or any combination, of the following purposes —
>
> (a) for exclusive use of the Government or of the Federal Government or for general public use;
>
> (b) for or in connection with the planning, establishment, extension, improvement or development of any town or township any purpose reasonably necessary or desirable in regard thereto, including the provision of open spaces and amenities and the setting apart of suitable sites for factories industries and trade;
>
> (c) for or in connection with provision of the residential accommodation for any section or class of the community including the officers, servants or employees of the Government or the Federal Government, and the families and employees thereof;
>
> (d) for obtaining control over land contiguous to, or required for or in connection with, any port, airport, railway, road or other public works of convenience;
>
> (e) for or in connection with any public utility undertaking or provision of any public service, undertaken or provided, or about to be undertaken or provided, by the Government, the Federal Government, a local authority or any corporation incorporated directly by written law;
>
> (f) for or in connection with any scheme relating to the settlement or re-settlement of any community, or of any section or class of the public, rural or urban;
>
> (g) for or in connection with the provision of land for the cultivation of padi, or for agricultural research or experimental purposes;
>
> (h) for or in connection with the conservation, improvement or exploitation of natural resources.

(ii) The second respondent is the authority charged with the duty and responsibility for supplying electrical power in the State of Sabah. The supply of electrical power

is a public utility, which duty may be implemented either by themselves or through independent power suppliers as was done in this case. In *Lau Koh Sing @ Lau Kok Sing v The Sabah State Government & Ors* [1998] MLJU 135 (at p 12):

> The basic complaint of the Plaintiffs is that to them the primary purpose of the acquisition of the said land was to enable the same to be realienated to Sabah Economic Development Corporation (SEDCO) which in turn, they alleged, would develop the said land in joint venture with a developer with the sole intention of making profits.

His Lordship further opined:

> As to how an acquired land for that purpose is to be utilised is another matter. But that should not affect the legitimacy of the acquisition.

In conclusion, this is what His Lordship has to say:

> In my view therefore and contrary to the submission of learned counsel for the Plaintiffs it becomes incidental as regards to how the extension or development of the township is going to be implemented

(iii) The said power station is for all intent and purpose the own project of the second respondent and they are meant for public purpose. The second respondent's very existence is formed under the shareholdings of Government entities, representing Government's interest, which is to provide electricity to the State of Sabah. In consequence, the disputed acquisition is not null and void, as the public purpose cum public utility is squarely within the definition of public purpose under s 2 of the LAO. The first respondent relies on the case of *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707, where the court ruled (at pp 716–717):

> This brings us now to the final point in the case. It is contained in Encik Amirudin's argument on which we did not invite any response. As we said earlier in this judgment, the appellant is a public company. It has shareholders among members of the public, for its shares are quoted in the Kuala Lumpur Stock Exchange. Nevertheless, it has certain statutory powers such as those set out in ss. 10 and 11 of the Act. When it issued the s 11 notice, it was exercising a statutory power as a licensee under the Act. So what answer is to be given to the question: does judicial review lie against the appellant? In our view, the answer lies in two words. It depends.
>
> If the activity of the appellant in the private law sphere is called into question eg, the wrongful allotment or issuance of shares, the alleged wrongful removal of a director and the like, then, plainly judicial review will not lie. On the other hand if the activity complained of falls within the public law environment, then of course judicial review will be available. Encik Amirudin valiantly sought to argue the unarguable by reference to passages in De Smith, Woolf and Jowell on *Judicial Review of Administrative Action*, (5th Ed). Those passages refer to privatized bodies in England and we do not find them useful in the present context. Encik Amirudin also referred to another privatized agency Telekom Malaysia Bhd, in order to show that judicial review ought not to lie in the present case. With respect we are not in a position to test the accuracy of that argument for we do not have before us the relevant legislation governing that privatized agency. We are now only concerned with the appellant's position in public law. And of that there is no doubt whatsoever in our minds. To agree with Encik Amirudin would be to place the appellant outside the purview of judicial review correction. That is hardly a desirable consequence. Whether any other privatized agency shall be subjected to judicial review would depend upon, as Mr Kenasalingam correctly submits, the terms of the particular statute.

A complete answer to Encik Amirudin's argument on this part of the case is to be found in the following passage in the judgment of Abdoolcader J (as he then was) in *OSK & Partners Sdn v Tengku Noone Aziz & Anor* [1983] 1 CLJ 288; [1983] CLJ (Rep) 317 at p 291 (p 322):

> In the light of the provisions of the Act and the constating and governing instruments we have referred to and on an application of the principles of law we adumbrated, it would appear that the Exchange is a hybrid corporation — a company incorporated under the Companies Act but recognized and regulated by the Act and subject to its governance and authority with therefore an element of public flavour superimposed on the contractual element in relation to its members. It is a statutorily regulated entity under the overall direction and control of the Minister in fundamental respects, thus manifesting a distinctive public element which is reflected particularly in the requirements of the provisions of s 6(2)(b)(vi) and (c) which prescribed the public interest as the prime consideration. The exercise of disciplinary powers by the Exchange is conferred and prescribed by legislation under which the Minister is to approve the scope and type of such powers and the exercitation whereof would affect the livelihood of its members. Generally statutes regulating the several professions provide for a body to be established to exercise disciplinary powers over its members but under the Act the method of discipline is effected by delegating that power to a body not established by the Act itself but which must be approved by the Minister pursuant to and is controlled and subject to its provisions, and so it virtually comes to nothing.
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> We should perhaps add, amend the learned Judge's assessment of its genre, that we cannot but express in the circumstances our view, pithily put perforce, that the Exchange is no more an exclusive club than the *Criminal Injuries Compensation Board* (in Ex p Lain which has been repeatedly applied since) can be said to be merely a welfare benefit society. The Board in that case contended that it had no real authority as its decisions only gave people a better but unenforceable chance of receiving charity from the Crown, but the court said that this did not detract from its authority.
>
> The Committee which is responsible for the management of the affairs of the Exchange is accordingly a body of persons having legal authority to determine the rights of persons licensed under the Act to carry on business as stock brokers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the exhibition of that power and it is therefore subject to judicial review by way of certiorari and prohibition.
>
> In our judgment the position of the appellant is not significantly different compared with that of the Kuala Lumpur Stock Exchange so as to exempt it from judicial review.

(iv) By analogy of the above cited authority, the second respondent is a hybrid-corporation performing statutory functions; if the impugned act committed is a matter within its public functions and hence, amenable for judicial review, then, it must come within the ambit of s 2 of the LAO. The very fact that the applicant has made the second respondent a party in this case is an admission that the second respondent is indeed amenable to judicial review. Such admission suggests that the second respondent is not a mere company but a hybrid corporation. The first respondent, in acquiring the subject land, did not commit any procedural error. In fact, there is no allegation on this. Neither is this case concerned with any breach of contractual obligation; which, if it had happened (which is denied), does not concern the applicant. In fact, as against the first respondent, the complaint framed

by the applicant as such is against the validity of the acquisition on the account of s 2 of the LAO. Being a hybrid corporation, representing the Government in implementing the said project as illustrated above, the applicant's contention on s 2 of the LAO could not sustain and is devoid of merits. Further, the applicant suffers no deprivation of purchase price. Right to claim for compensation on fair market price is provided for under ss 14 and 21 of the LAO.

[12] The second respondent, inter alia, submits as follows: (i) the second respondent is a company duly incorporated for the sole function of generating and supplying electricity power for the state. (ii) the purpose of the compulsory acquisition of the said land for the construction of a power plant to generate and supply electricity power is indeed a public utility for the benefit of the public in the state. As it is for the betterment of the society in general, it is therefore within s 2(a), that is to say for general public use. It is asserted that the purpose remains as it is, that is for the general public even though such purpose would be undertaken by the second respondent, a corporation also owned by the first respondent albeit licensed under the Electricity Supply Act 1990. *In Lau Koh Sing @ Lau Kok Sing v The Sabah State Government & Ors* [1998] MLJU 135, His Lordship Richard Malanjum J (as he then was) opined that how an acquired land is to be utilized should not affect the legitimacy of the acquisition. Regardless of the second respondent's involvement in the construction and operation of the power station, the facts remain that the ultimate end user of the facility will be the public and not for the sole benefit of the second respondent and this must surely come within the scope of the LAO.

[13] The third respondent, inter alia, submits as follows: (i) on the authority of the decisions of the Privy Council in *Syed Omar Bin Abdul Rahman Taha Alsagoff & Anor* and the Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang* and *S Kulasingam & Anor*, it is asserted that any decision or declaration or gazette pertaining to compulsory acquisition can be questioned on the following grounds: (a) the acquisition was not done in accordance with the LAO; (b) the acquiring authority had misconstrued its statutory powers; and/or (c) the acquisition was done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness; and/or (d) the purpose stated in the acquisition declaration does not come within the ambit of the relevant provisions of the LAO; (e) the acquisition was done in bad faith. The phrase 'public purpose' is defined in s 2 of the LAO to mean any, or any combination, of the purposes stated in (a) to (h) thereof. A power station is obviously a public utility. Thus, it amounts to a public purpose for a public utility undertaking within the meaning of the phrase 'for or in connection with any public utility undertaking' appearing in s 2(e) of the LAO. The public service would be undertaken by the second respondent, which is a corporation wholly owned by the Federal and State Governments and duly licensed under the Electricity Supply Act 1990 to supply electrical energy to the public in Sabah, and this tantamount to public service to be provided by the government or any Corporation, incorporated directly by written law. Hence, it comes within the meaning of s 2(e) of the Land Acquisition Ordinance. The Court of Appeal in *Ahmad bin Saman v Kerajaan Negeri Kedah* has laid down what it views as the correct test to be applied in determining the meaning of 'public purpose':

A We are of the view that the correct test to be applied in determining the meaning of 'public purpose' is as suggested by his Lordship Hashim Yeop A Sani J in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204, at p 208:

> The expression 'public purpose' is incapable of a precise definition. No one in fact has attempted to define it successfully. What all the textbooks have done is to suggest the tests
B to be applied in determining whether a purpose is a public purpose. Various tests have been suggested. But in my view it is still best to employ a simple commonsense test, that is, to see whether the purpose serves the general interest of the community.

(iii) Applying the aforesaid test, a power station, which generates electrical energy for the ultimate use of all consumers of electricity, must be deemed to serve the general
C interest of the community and therefore the construction of the power station must come within the scope of public purpose. In essence, the PPA provides for the third respondent to generate and deliver electrical energy and make generating capacity available to the second respondent for onward sale to the end user consumers ie, the public as the second respondent is the only authority granted a license under the
D Electricity Supply Act 1990 to supply electrical energy to the public in Sabah. Hence, it comes within the meaning of 'or for general public use' appearing in s 2(a) of the LAO and therefore falls within the interpretation of public benefit. The power station also comes within the meaning of 'any purpose reasonably, necessary or desirable in regard to the improvement or development of Kota Kinabalu' appearing in s 2(b) of the LAO, as with the construction of the power station, there would be an increase
E in the availability of electrical energy for supply and this would have an effect on the improvement or development of Kota Kinabalu. Since the subject land has been found to be a suitable site for the power station, which constitutes a factory or industry, therefore it comes within the meaning of 'the setting apart of suitable sites for factories industries' appearing in s 2(b) of the LAO. The subject land is required
F for the construction of a power station which when completed would generate electrical energy through the second respondent to the end user consumers and this amounts to a provision of public works of convenience to the general public since after all the supply of electricity to the general public is for their convenience and not for the convenience of the first to third respondents. Hence, the subject land is required 'for or in connection with public works of convenience' appearing in s 2(d)
G of the LAO. The power station generates electrical energy through the use of water, which is a natural resource, and therefore the power station involves exploitation of a natural resource. Hence, it comes within s 2(h) of the LAO. (iv) The applicant's complaint is misconceived as the acquisition was made and can only be made by the first respondent if the first respondent is satisfied that the acquisition was for a public
H purpose. The acquisition was indeed for such social benefit and the declaration gives rise to a conclusive evidence clause in s 3(1) to that effect. The public utility in question ie, power station, comes within the definition of public purpose. Once it is established that the reason for which the subject land had been acquired is a public purpose, the issue of who is responsible for the construction of the power station is
I wholly irrelevant. The reason for the acquisition of the subject land is not for the purpose of acquiring it at a cheaper price in order to sell it later at a higher price so that the respondents may make a profit. The third respondent relies on the case of *Ahmad bin Saman v Kerajaan Negeri Kedah*, where it was asserted that the improper purpose as alleged by the applicant is not one of the grounds on which the acquisition can be challenged. This principle is consistent with the decisions in *Pemungut Hasil*

Tanah, Daerah Barat Daya, Pulau Pinang; *Syed Omar Bin Abdul Rahman Taha Alsagoff & Anor* and *S Kulasingam & Anor*. Hence, it is not open to the applicant to challenge the acquisition on the grounds of improper purpose. (v) In relation to the conclusive evidence clause in s 3 LAO, the Federal Court in *Syed Omar Bin Abdul Rahman Taha Alsagoff & Anor*, when dealing with a similar conclusive evidence clause in the Land Acquisition Act 1960, held that a declaration to that effect is conclusive evidence that the subject land is needed for the purpose specified therein. This was upheld by the Privy Council in *Syed Omar Bin Abdul Rahman Taha Alsagoff & Anor*. Thus, it is not open to the applicant to challenge the conclusive evidence in the declaration that the acquisition was for a public purpose ie, construction of public utility namely power station, Kota Kinabalu. In *S Kulasingam & Anor*, the Federal Court appears to support the proposition that the conclusive evidence clause is final and decisive and cannot be questioned and referred to by another Privy Council decision in *Wijeyesekera v Festing* [1919] AC 646 in support thereof. In *Galstaun & Anor v Attorney-General* [1981] 1 MLJ 9, the Singapore High Court followed the Privy Council's decision in *Wijeyesekera v Festing*. It further declared that the government is the proper authority for deciding what a public purpose is and thus, when a government declares that a certain benefit is a social benefit, it must be presumed that the government is in possession of facts which induce the government to declare that the interest is a public interest. The approach taken in *Galstaun & Anor* is consistent with the one taken by the Federal Court in *S Kulasingam & Anor*. In this connection, even the High Court of Australia in *Attorney-General of the Commonwealth v RT Co Pty Ltd; WH Blakeley & Co v Commonweatlh* [1953] ALJ 672, favours the reasoning taken by the Privy Council in *Wijeyesekera v Festing* when it said:

> The notification must be conclusive if the meaning of the Act is to be effective. To treat s 16(1) as always subject to the condition that, independently of the notification in the gazette under s 15(2), there must be a fulfilment of the condition found by the argument in s 13 would be to introduce into s 16(1) an unexpressed contingency calculated to defeat its purpose. It is impossible to suppose that the Act intends that the operation of the Gazette shall always be subject to an inquiry into the real existence in the Governor-General in Council of an intention to use the land for a declared purpose.

[14] The words in s 3(1) of the LAO are clear and unambiguous and therefore effect should be given to it. In this connection, reference should be made to the following passage in the Federal Court's decision in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 (at pp 43–44):

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded...
>
> We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification …

A

> We are of the view that the provisions of the Act under consideration before us call for a purposive literal construction which is one which allows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment...

B

> The provisions of the Act are abundantly clear to refute any resort to a purposive and strained construction which requires a strained meaning where the literal meaning is not in accordance with the legislative purpose.

[15] In *Tan Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117, the Supreme Court held that *The legislative intention … must be construed within the framework and the general purpose of the Act'*. The LAO is a law governing compulsory acquisition of land for public purposes. By its very nature, it is a law allowing for an invasion against the landowner's proprietary right and the powers are obviously intended to be of a draconian nature. Hence, s 3(1) of the LAO must be construed within the framework and the general purpose of that LAO. The object and intent of legislating the LAO or it's like was well articulated in the Federal Court's decision of *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 where it was opined (at p 352):

C

D

> It is right to say at the risk of being trite, that in interpreting a statute, what the court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute. In *Cheatley v R* [1972] 127 CLR 291, Barwick CJ said at p 296: *In construing the section we are seeking Parliament's intention*. Similarly, in *A–G (Canada) v Hallet & Carey Ltd* [1952] AC 427, Lord Radcliffe said at p 449: *… every statute is to be expounded according to its manifest or expressed intention.*

E

> To whom can the judges turn for help in their task of determining Parliament's intention? The orthodox view is not Parliament or the draftsman; they have to discover that intention from the words that Parliament has used in the particular statute. This proposition has been well brought out by Lord Simon of *Glaisdale in Farrell v Alexander* [1977] AC 59 at p 81; 2 All ER 721 at p 733; [1976] 3 WLR 145 at p 158;

F

> …in the construction of all written instruments including statutes, what the court is concerned to ascertain is, not what the promulgators of the instruments meant to say, but the meaning of what they have said. It is in this sense that 'intention' is used as a term of art in the construction of documents.

G

In *Hatton v Beaumont* [1977] 2 NSWLR 211, the court had occasion to observe at p 255:

H

> The function of the court…is to give effect to the intention of the legislature. This it may do without difficulty where it appears from the terms of the legislation that the legislature directed its intention to the question and expressed an intention upon the effect to be given to the particular provision. But in most cases…such an intention is not expressed and the court's task is, by the application of the appropriate principles, to divine or impute that intention.

I

> It is a truism that Parliament does not always use plain words to express its intention and when this is the case so that the words used fail to convey the intention, courts may then have to resort to the device of ascertaining that intention by necessary implication from the words which Parliament has used. Courts are, however, slow to find an intention by mere implication.

(vi) For reasons stated above, the acquisition was done in accordance with the LAO and therefore the acquiring authority did not misconstrue its statutory powers. In consequence, the applicant's application for judicial review ought to be dismissed with costs.

[16] The learned counsel for the third respondent, Mr Sugumar Balakrishnan, in an unusual manner, as a form of preliminary objection as well as a protest, asserts that the applicant has not satisfied the threshold jurisdiction test for the grant of leave and stay order. He therefore seeks an order for the stay to be set aside and for that purpose, inter alia, submits as follows: (i) as a result of the stay order, all works relating to the construction of the power station by the third respondent had to cease and has ceased until current date. Though, the granting of leave is discretionary, in an application for leave, however, the court is governed by the established principles, propounded by the Supreme Court in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 where Ajaib Singh SCJ (as he then was) observed (at p 229):

> The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

[17] There was no substance at all to support the applicant's application for the reasons stated hereinafter. A perusal of the applicant's affidavit shows that the applicant's grievance is that the said land had been acquired while she was in the process of negotiating for the sale of the subject land to the third respondent. Hence, it is clear that the applicant wanted to sell the subject land for consideration, although there was no binding contract between the applicant and the third respondent in this connection. (ii) s 6 of the LAO expressly provides for the applicant's entitlement to receive a fair and reasonable compensation for the acquired land and if she is not satisfied with the offer of compensation made by the first respondent, she is entitled to have her claim referred to the Judge of the High Court for determination, pursuant to s 14 of the LAO. Hence, there is no question of the applicant being deprived of her land without adequate compensation. (iii) the grounds on which judicial review might be sought has been set out in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, which was approved by the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, where Lord Diplock stated:

> … one can conveniently classify under heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

[18] Since none of the three grounds existed on the face of the record of the applicant's application, statement and affidavit, leave ought to have been refused at the leave stage itself. The applicant is applying, inter alia, for an order of certiorari and order of prohibition in her application for judicial review. These remedies are public law remedies and it is trite law that these remedies can only be issued to a body which has the legal authority to determine questions affecting the rights of the public. The first respondent has no legal authority under the LAO to determine questions

affecting the rights of the public. There is no question of the first respondent having a duty to hold an inquiry before compulsory acquisition nor is there a right to be heard: see *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors*. Hence, there is no jurisdiction for the court to grant an order of certiorari or an order for prohibition, since such leave should not have been granted in the first place. (iv) it is pertinent to note that the applicant is seeking an order of prohibition directed to, inter alia, the second respondent. The second respondent is not a body with legal authority to determine questions affecting the rights of the public. The second respondent is a private limited company. Hence, leave should not have been granted to the applicant to apply for an order of prohibition against the second respondent. In the present case, upon compulsory acquisition of the subject land, the right of the applicant under the LAO is to receive a fair and reasonable compensation and the LAO provides for determination of the fair and reasonable compensation to be received by the applicant and the applicant's only remedy is that provided under the LAO. Thus, there is in place an alternative remedy provided under the LAO; as such the applicant should have exercised that alternative remedy. In the present case, the applicant has not taken recourse to the alternative remedy which she should have done. Especially, since all that she is interested in, is receiving a fair and reasonable compensation as she was at all material times a willing seller of the subject land. Hence, the authority of *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, where it was asserted that leave to apply for the order of certiorari and the order of prohibition should not have been granted, is relied on. (v) the applicant is also seeking a declaratory order in her application for judicial review. This remedy, like the one of certiorari and prohibition, are discretionary in nature and therefore the existence of an alternative adequate countermeasure as stated in para 51 hereof should disentitle the applicant from being granted leave to apply for this remedy at the leave stage. Since the said land had been acquired in accordance with the law and the acquiring authority did not misconstrue its statutory powers under the LAO, even at the leave stage it could be seen that there was no utility or usefulness in granting leave to apply for the declaratory order. On the other hand, considerable inconvenience and embarrassment would result in granting leave to the applicant. As has been observed by Lee Hun Hoe CJ (Borneo) (as he then was) in *Datuk Syed Kechik bin Syed Mohamed v The Governments of Malaysia and Sabah* [1979] 2 MLJ 101 (at p 107):

> In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand.

[19] In the circumstances, the applicant had not even satisfied the threshold jurisdiction for grant of leave and the consequential stay order as there was no substance at all in the grounds supporting the application for judicial review. This can only be described as being frivolous or vexatious and wholly academic in the circumstances, since upon notification by way of the prerequisite declaration and gazette, the subject land is deemed to have been vested in the first respondent (see *Tuan Haji Sarip*).

[20] I think, to efficiently deal with the preliminary objection or protest in the right perspective, it is necessary and essential for me to make a critical appraisal of the

origin, concept, and limitation of the doctrine of judicial review and the wider concept of doctrine of separation of powers and to set it out in a summary manner, I have, inter alia, relied on the following works, namely: (i) Datuk Dr Rais Yatim, *Freedom Under Executive Power in Malaysia,* Endowment Sdn Bhd, Kuala Lumpur, 1995; (ii) *Recent Developments in Malaysian Constitution*, Public Lecture by YAA Tun Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, Chief Justice of Malaysia at the 19th Singapore Law Review Lecture on the 13 March 2006 at the Auditorium, Supreme Court Of Malaysia, http://www.malaysianbar.org.my/content/view/2609/27/; (iii) N Sivabalah, *O 53 of Rules of High Court 1980: Procedural Rules of the Old and New* (citation N/A); (iv) Several articles of Sudha CKG Pillay in MLJ; (v) Michael Fordham, *Judicial Review Handbook*, (2nd Ed) John Wiley & Sons Ltd England 1997; (vi) Chaudhry's, *AS Law of Writs* (4th Ed) Law Publishers (India) Pvt Ltd 1990.

[21] Judicial review is nothing but a potent and effective procedural device within the armoury of the High Court to supervise and control the decision making process of public bodies or like to ensure that they act within the spirit and powers of the statutes and if necessary to restrain the decision maker from acting in excess and/or abuse of power. This process is also used to check and arrest executive excesses and encroachment. The concept originates from the doctrine of separation of powers which flows from English legal jurisprudence and in the Malaysian context it can be explained in a simple manner as follows:

(i) The doctrine of separation of powers is not a concept written in the Federal Constitution, because it is the foundation of the constitution itself, without which the establishment will collapse and will have no footing to stand on. There are also other concepts such as Independence of Judiciary, Judicial Review, which are not written in the constitution but stands as *a sine qua non* to protect the constitution and without these concepts and its application the constitution cannot function as intended. As such the constitution cannot be read in isolation.

(ii) The three pillars of the constitution, namely the executive, legislature and the judiciary, directly and/or indirectly, which I say is the foundation for the constitution, are appointed at the pleasure of the public. For, the two pillars can be replaced by the public and one pillar only by parliament, and who should be in parliament is always determined by the public.

(iii) All the said pillars before coming into office take an oath to protect the constitution. In consequence, they have taken upon themselves a sacrosanct duty and obligation to the public to ensure that one pillar does not undermine the other in whatever manner, because the weakness of any of the pillars will undermine the stability of the constitution and this will ultimately affect the public. Although, humans can stand on two legs or one, the Federal Constitution needs all three to stand individually to uphold the constitution and protect the public. This concept of standing separately to protect public interest is often termed as the doctrine of separation of powers.

(iv) Under the said doctrine, executive, with the help of legislature can pass any laws within the frame work of the constitution only. However, when any laws are made to exclude the final decision making process by the courts, they will

tantamount to tinkering with one of the pillars of the constitution itself and thereby weaken the judiciary and this will also undermine the constitutional role of the courts. This per se is not permissible as it will result in the public being ruled by law and not by rule of law, as envisaged by the Federal Constitution at the time of its inception. This doctrine is articulated by art 4 of the Federal Constitution which asserts that the constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this constitution, shall to the extent of the inconsistency, be void. And this is very importantly reflected in Rukun Negara or the pillars of the nation which commands: Belief in God, Loyalty to King and Country, Upholding the Constitution, Rule of Law, Good Behaviour and Morality. And the concept of rule of law does not permit legislature or executive to subject its citizen to any form of arbitrariness which will impinge on them to enjoy the dignity of man. And the judiciary is required to protect that dignity.

(v) The judges have taken oath of office to protect the constitution. The executive and legislatures under the doctrine of separation of powers has a duty to the public to ensure that judges' oath to protect the constitution is not made illusory by enacting laws which attempts to take judicial scrutiny on executive decisions. This duty is a *sine quo non* to protect the constitution, the protection of which in its true sense means protecting the public. This is also the basic tenet of the constitution and Rukun Negara.

(vi) Parliament cannot pass law or amend the constitution to by pass judicial supervision on executive decision as it will be totally abhorrent to the notion of the doctrine of separation of powers. There is no doubt that Parliament is supreme, subject only to the constitution, any attempt to tinker with the foundation will be against their oath of office and such attempt will have to be treated by the courts as *ultra vires*, the spirit and intent of the constitution by virtue of the doctrine of separation of powers when it comes for judicial scrutiny. Further, it will be against judges' oath of office to consider such laws and the decisions which recognise such laws are always unconstitutional but still valid unless set aside. Where decisions are perceived to be unconstitutional, the courts have a judicial duty coupled with sacrosanct entrustment of the public, pursuant to the doctrine of the separation of powers and oath office, to revisit such decisions in the wider interest of the public and also to uphold their esteem and dignity as judges of their constitution and also as the component pillar of the Federal Constitution. At the same time, the judiciary has sacrosanct duty to ensure that the functions of the executive and the legislature, in the right perspective, are not undermined. There is a balance of cardinal importance which has to be met with to maintain the respective role and status quo of the pillars. In consequence, pure interpretation of law which may destabilise the constitutional role of the executive and legislature and undermine the progress, development and stability of the nation is averted and the interpretation of certain aspects of the law is tempered with matured interpretation. In England, they discreetly call it as 'policy consideration' which more often than not is reviewed on case by case basis, according to the needs of the nation, taking into consideration public interest as a whole.

(vii) Any aggrieved person can now complain to the court as of right if he can satisfy the threshold requirement of locus standi, as set out in various cases, which is subject to O 53 RHC. However, if the complainant is not an aggrieved person, and the complaint is of a serious nature and the general locus element is not satisfied, then under the doctrine of separation of powers, the courts in performance of its constitutional role, can on its own motion take cognisance of the complaint and hear the relevant parties and pass suitable orders or directions. But, such acts are extremely rare and the issue must be one where public interest will be compromised or issues of a nature which is extremely serious. In India, it is called judicial activism and/or public interest litigation which permit a litigant, who does not have a private right of his own, to commence proceedings to redress a public wrong which is alleged to have been violated by government or public body. There is no precedent in Malaysia for the last 20 years as seen in other jurisdiction. However, the right to place the complaint of any nature is with courts but that does not mean that the complaint must be heard or relief granted. At times the complaint itself can expose the error or omission and this may help to bring such errors to the notice of the concerned bodies for their correction. The right to complain must not be confused with the 'locus standi' test. Further, the right to complain may be subject to 'ouster clauses' which the court may want to tolerate, where on the whole it is a necessity and need and justifiable in the circumstances of case, and they have absolute discretion to revisit such decision if the impact of not doing so is devastating. Thus, the right to complain to the court is a fundamental right and whether the complaint will be heard is another matter. But if the complaint is dismissed the complainant may be burdened with costs, and may also be subject to a claim in damages, unless otherwise ordered by the court.

(viii)The concept and doctrine of judicial review in England has developed only to entertain exclusive complains and for this purpose much fetters have been placed by the courts to control exodus of complaints against public bodies by busy bodies and alike. The development of law there will clearly show that the goal post for obtaining the relief has often been moulded from time to time and is not seen as a static concept.

(ix) The doctrine of judicial review in India has developed leaps and bounds as the remedy of issuing the prerogative writ stands as a constitutional remedy entrenched in the Indian constitution. This is not the case in England as England does not have a written constitution and to protect whatever they have is done so by the common law powers of the court. These common law powers have developed in a restrictive manner but with effective remedy and reliefs sufficient to protect the doctrine of separation of powers. These laws will appear to be in development because it is required to be spelt out by judges from time to time when justice of the case so warrants. These jurisdiction and powers cannot be taken away by parliament in England as they are needed to protect the unwritten constitution. The position in Malaysia is hybrid in nature for the right to issue prerogative writs are not spelt out in the constitution but in the statutes. Since the criteria to issue is not spelt out, it necessarily requires the adoption of the common law principles, more importantly the doctrine of separation of powers to protect the constitution

and act on other incidental matters such as excess and abuse by public bodies. In England, the Supremacy of Parliament is such that the English courts have no power at all for judicial review of legislation but that is not the case here because of the several protective articles entrenched in the Federal Constitution. This is an obvious difference where the courts here have to deal with independently. Hence, the English Jurisprudence on the concept of judicial review and alike cannot be the cure for all maladies. Thus, entire reliance of English authorities moulded to the doctrine of Supremacy of Parliament may not be sufficient to protect a written constitution where dominant reliance has been entrusted to the judiciary to protect and defend the constitution relating to law and justice, more so after 50 years of independence and our legal jurisprudence can never be reduced to the status of dependency. Hence, there has been much development of law in the area relating to judicial review

(x) Much literature has been fashioned by jurists and judges proclaiming the courts' jurisdiction and powers in a restrictive manner. It will appear to be unnecessary as this creates utter confusion, for under the doctrine of separation of powers, the court is the supreme body to decide what is right and what is wrong in any given circumstance. More so when it has to check any form of errors, whether they be judicial or on merit. The court can and always must act to cure any form of injustice within the parameter and scope of the doctrine of separation of powers, to be read with the spirit and intent of the Federal Constitution. Our courts are not obliged to follow the fetters and restrictions placed by English courts. If judicial fetters are employed, it is only for the purpose of stopping busy bodies who ultimately cannot be given any form of relief from disturbing the courts and the workings of the government and public bodies. Further, the courts always have the option to penalise such busy bodies and advocates who fail to bring serious issues relating to breach of constitutional safeguards. Judicial fetter must not be seen as absolute and immutable fetter as the courts have jurisdiction and powers, inter alia, under the doctrine of separation of powers to revisit them and act according to the justice of the case. In particular, when it is not related to matters involving interests of national security or public order in its true sense.

(xi) All the three pillars are expected by their oath of office to provide exemplary duty to the nation and that service is much more superior to any other service provided by any of the institutions in the country, because it is a sacrosanct duty which needs full courage and commitment to ensure, peace, prosperity, harmony to the public and its future generations. And this exemplary mission can only be achieved by upholding the spirit and interest of the Federal Constitution and nothing less. For this very purpose, each pillar has to respect the role of the other, and there is sufficient provision in the constitution and law to check each and every pillar's excesses and make them accountable to the public. One such provision permits the judges to be removed and the other is the provision for judicial review to check among others executive excesses. Thus, it is a well planned constitution and law, provided it is given full force and effect. No pillar is supreme. All are subject to accountability. Each pillar is not expected to compete with each other, which is the foundation of the constitution. They are required to respect each other and also complement

each other for nation building. And also accept that the Federal Constitution with the doctrine of separation of powers, independence of judiciary and judicial review is the charter for progress, democracy and nation building in the right perspective. In *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, HRH Raja Azlan Shah FJ (as HRH then was) articulated some of the difficult propositions and concepts as follows (at pp 188, 190):

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modem terms that we are a government of laws, not of men.
>
> This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as *the supreme law of the Federation …* (cl 1 of art 4). It is thus the most vital working document which we created and possess. If it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power, in its own nature illimitable.
>
> There is a world of difference between legislative immunity and a constitutional guarantee. The Constitution, by its very nature, creates the distinction. A constitutional guarantee cannot be wiped out by a simple legislative process as opposed to constitutional amendment.

[22] The jurisdiction and power to so act for the purpose stated above is captured partly in Courts of Judicature Act 1967 ('CJA'). In England now, it is done so pursuant to s 31 of the Supreme Court Act 1981 and the common law, and in India it is supreme as it stands as one of the constitutional functions of the superior courts, a doctrine which has been preserved in their arts 32, 139 for the Supreme Court and art 226 for the High Court to issue, inter alia, writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto,* and *certiorari*.

[23] The remedy and relief for judicial review is in the nature of order for mandamus prohibition, certiorari and writ of *habeas corpus*, etc, which originates from the law of prerogative writs embedded in the history of common law and judicial institutions in England. Prerogative writs were issued by the courts, only upon proper cause shown and never as a matter of right. Generally, it was issued where there is a direct interference by the government with the liberty and property of the subject and is issued pursuant to the prerogative powers of the crown.

[24] In Malaysia, the relief, formerly available only by such writs, is now obtainable, pursuant to the CJA and the procedure to acquire the same is set out in O 53 of the RHC.The new amendment to the said order sets out the full procedure for judicial review. It makes major changes in the present procedure and relief. A senior member of the Malaysian Bar, N Sivabalah has in my view adequately dealt with the scope of the said amendment and I do not propose to repeat the same save to say that the High Court has additional powers in particular to issue prerogative writs to any person or authority, direction, order or writs, including writs of the nature of *habeas corpus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Federal Constitution, or any of them or for any purpose. Even if such powers are not there or are restrictively worded as is reflected in the CJA, the courts are necessarily vested with such powers within the doctrine of separation of powers to protect the constitution with always the right to issue the prerogative writs or orders as the case may be and at common law ordinarily: (i) if *mandamus* is issued it is directed to private or municipal corporation, or any of its officers or to an executive or administrative or judicial officer or to an inferior court, commanding the performance of a particular act therein specified and belonging to his or their public, official or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived. The remedy by way of *mandamus* is a drastic one and generally it is only invoked in extraordinary situations, after the court having been satisfied the applicant has exhausted all other avenues available to him; (ii) If prohibition is issued it is to prevent an inferior tribunal from exceeding its jurisdiction or even from assuming a jurisdiction which does not vest in it by law. Generally, the order is directed only to judicial or quasi-judicial authority, in respect of proceedings before them. It is not for use against private individuals where no question of breach of public or statutory duty is involved. Unlike an order for *mandamus*, the existence of an alternative remedy is not generally a bar to obtain an order of prohibition; (iii) If certiorari is issued it is directed to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The purpose is to inspect the proceedings and determine whether there have been any irregularities. The object is to keep the exercise of powers by judicial and quasi-judicial tribunals within the limits of their jurisdiction assigned to them by law and to restrain them from acting in excess of their authority, and if necessary to quash their decisions. Generally, the existence of an alternative remedy is not a bar to obtain an order for certiorari when the inferior tribunal has purportedly acted without jurisdiction or in excess of jurisdiction.

[25] The principles, law, practice and procedure for judicial review in England can be summarised as follows: (i) judicial review stands as an exclusive procedure for public law challenges (see *O'Reilly v Mackman* [1983] 2 AC 237 and *Roy v Kensington and Chelsea and Westminister Family Practitioner Committee* [1992] 1 AC 624); (ii) the discretion to grant or withhold the relief is entirely with court and is not seen as a substantive right (see *Regina v Monopolies and Mergers Commission, Ex parte Argyll Group Plc* [1986] 1 WLR 763); (iii) the review is in respect of a decision, relating to a statute or executive function and excludes private law matters and non justifiable public matters (see *Regina v Panel on Take-Overs and Mergers, Ex parte Datafin Plc & Anor* [1987] 1 QB 815; *Regina v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan* [1993] 1 WLR 909); (iv) the applicant 'must show sufficient

interest' but the sufficient interest test is more often interpreted in a flexible manner according to the justice of the case (see *Reg v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; *WDM* [1995] 1 WLR 386); (v) the court, unlike in appellate jurisdiction, will not entertain arguments on the merit to substitute their own view on questions entrusted to the decision maker (see *Regina v Secretary of State for the Home Department; ex parte Brind & Ors* [1991] 1 AC 696); (vi) The relief must be grounded at least on one of the heads namely: (a) 'illegality' ie, error of law, excess of power, breach of duty etc (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Regina v Lord President of the Privy Council, Ex parte Page* [1993] AC 682); (b) 'irrationality' ie, patent unreasonableness, abuse of power, etc [*Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997); (vii) 'procedural impropriety' ie, unfairness in the decision making process etc; (*Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155; *Regina v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531); (viii) 'ouster clauses' which attempts to oust the jurisdiction of the court from visiting the decision of the decision maker does not ordinarily oust the courts' jurisdiction [see *R v Cornwall County Council, ex parte Huntington and another* [1994] 1 All ER 694; *R v Secretary of State for the Home Department, ex parte Fayed and another* [1997] 1 All ER 235]. (ix) Issues relating to fundamental rights receives special attention (see *Reg v Home Secretary, Ex p Bugdaycay* [1987] 1 AC 531E; *Regina v Ministry of Defence; ex parte Smith* [1996] QB 554D); (x) court can grant interim relief (see *M* [1994] 1 AC 377); (xi) third parties who are affected can participate in the proceedings (see *Regina v Rent Officer Service and Another, Ex parte Muldoon* [1996] 1 WLR 1103).

[26] In England, to obtain the relief: (i) the complaint of the applicant must be grounded upon a justifiable public law or decision or activity where there is no effective statutory ouster clause; (ii) the applicant must have sufficient interest in the matter and there is no other suitable remedy; (iii) the issue is not academic, the challenge is prompt and the applicant is not asking the court to substitute its decision on questions entrusted to the decision maker; (iv) finally, it must show some substantive flaw which is likely to vitiate the decision such as, error of law, excess of power, breach of statutory duty, bad faith, procedural fairness, bias, etc, In *Anisminic Ltd v Foreign Compensation Commission* the House of Lords diluted the effect of ouster clauses, in a two-fold manner. Firstly, they held that ouster clauses were a nullity in respect of jurisdictional errors committed by decision-making tribunals. Secondly, they expanded the scope of jurisdictional errors by holding that a tribunal could commit a jurisdictional error by giving a decision in bad faith; making a decision which it had no power to make; failing to comply with natural justice; misconstruing the provisions giving it the power to act so that it failed to deal with the question remitted to it; refusing to take into account something which it was required to and taking into account something it had no right to. Lord Reid there said that this catalogue of errors was not intended to be exhaustive.

[27] One of the leading cases which expounds the traditional doctrine of judicial review is the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, where Lord Diplock set out the three criteria for review and they are:

(i) illegality; (b) irrationality; and (c) procedural impropriety and also set out the ground work for the fourth which was termed as proportionality. Lord Diplock expounded that: (i) Illegality means the decision maker must understand directly the law that regulates his decision making power and must give effect to it; (ii) Irrationality, his Lordship says, can be succinctly referred to as *Wednesbury* unreasonableness in reliance with the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided on could have arrived at it; (iii) Procedural impropriety covers not only a failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision, but also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice; (iv) Proportionality has been used as a head of judicial review in cases where the sanction or punishment meted out is altogether excessive and out of all proportion to the occasion (see for eg *R v Barnesley MBC, Ex parte Hook* [1976] 1 WLR 1052; *Wheeler v Leicester City Council* [1985] AC 1054). This requires public authorities to maintain a sense of proportion between the objectives pursued by them and the means they employ to achieve such objectives, so that their actions do not unnecessarily intrude on individual rights in the pursuit of such objectives but only so far as is necessary to preserve public interest.

[28] There are number of Malaysian cases, where the above principles were discussed, adopted and/or elaborated. Some of them are as follows: (i) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; (ii) *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; (iii) *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; (iv) *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487; (v) *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481.

[29] The traditional approach to certiorari was very restrictive and is reflected in the Privy Council decision of *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1980] 2 MLJ 165. It was held that *a mere error of law on the face of the record* was insufficient ground upon which to grant an order of certiorari. Certiorari would only lie where the Industrial Court had acted *ultra vires* or in excess of its jurisdiction. This was adopted in the Supreme Court decision of *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, wherein Abdoolcader SCJ (as he then was) held that *for a jurisdiction defect, it is not enough to establish error of law. It must be shown that that error goes to jurisdiction, power or validity.* Further, in the case of *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Berhad* [1995] 2 MLJ 442, the Supreme Court opined (at p 451):

> In our view, upon the evidence before it, the Industrial Court was entitled to make the findings of act which it did. The fact that we might have come to a different conclusion is beside the point. Accordingly, it could not be said that any of those findings were perverse.

Furthermore, neither the award nor the reasons therefor, suffered from any jurisdictional error or were they violative of the rules of natural justice or vitiated by errors of law on the face of the record. Moreover, we could detect no trace of bias. We were therefore of the view that a substantive application for certiorari — had there been one — was bound to fail and so, on this further ground also, the order for leave ought not to have been granted.

[30] A radical change to widen the scope of the above proposition took place in the Court of Appeal's decision in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, where Gopal Sri Ram JCA opined (at p 342):

In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

[31] The change was accepted and adopted by the Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369. In the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481, the Court of Appeal widened the scope further. Gopal Sri Ram JCA opined (at p 514):

I pause to emphasize that the Minister's decision, one way or the other, upon the question whether representations made under s 20(1) are frivolous or vexatious, is neither final nor conclusive, and may be reopened in judicial review proceedings. A court may, upon an objective assessment of the facts and material that was placed before the Minister, fairly come to the conclusion that the representation is, or is not frivolous or vexatious and hence merits reference to the Industrial Court for an award.

The approach which I adverted to a moment ago is what I will term as the '*Hashim Yeop*'s test'. It was formulated by the eminent judge, whose name it bears, in *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9. The facts of that case were these. …

To summarize, when a question arises as to whether the Minister has correctly exercised his discretion under s 20(3) of the Act, it is the solemn duty of a court to undertake a meticulous examination of the facts that were made available to the Minister. If the

examination reveals that the representations made under s 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of certiorari.

[32] It was further expanded in the Federal Court in the case of *R Rama Chandran*, by Edgar Joseph Jr FCJ, where he opined (at pp 191–198):

> … It is clear law that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts' inherent power and its extent may be determined not merely by judicial development but also by legislative intervention …
>
> … It is pertinent to note that the jurisdiction of the courts in Malaysia to issue prerogative orders is derived from the prerogative jurisdiction inherited from English decisions as well as from statute, ie, s 25 of the CJA read with para 1 of the Schedule thereto... which is generally in pari materia with art 226(1) of the Indian Constitution... and so it would be wrong to assume that the powers of our courts in the field of Public Law remedies is limited in the same manner as that of the courts in the UK where there are no such equivalent provisions …
>
> … If, as appeared to be the case, this wider power in the field of Public Law remedies is enjoyed by our courts (and the majority so held), the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the case will have to be applied …
>
> … The court is here concerned with an appeal which arose from Judicial Review proceedings whose target was an award of the Industrial Court, an inferior court, and not an administrative decision by bodies or persons who were charged with the performance of public acts or duties. It could not be said, therefore, that by intervening in the manner which the Court proposed to do, the Court would be trespassing into the domain of the executive, thus violating the doctrine of the separation of powers, and so acting undemocratically.

[33] More development was made in the case of *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789, where Gopal Sri Ram JCA (sitting in the Supreme Court) opined (at pp 797–799):

> It must be borne in mind that the principal ground of complaint advanced by the respondent before the learned judge was that the award was perverse. That is simply another way of saying that the award was one which no reasonable tribunal in the circumstances would have made. In public law, this proposition is known as '*Wednesbury* unreasonableness'; a shorthand form to summarize the Delphic pronouncement by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. It is one of the well-recognized grounds upon which the decision of a public decision-maker may be challenged in the courts.
>
> Until very recently, it was generally thought that when a decision is challenged on grounds of '*Wednesbury* unreasonableness', the court is confined to an examination of the

> decision-making process and not the merits of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach without analysing later judicial pronouncements that had addressed the subject. The fallacy of the doctrine that judicial review is always confined to the decision-making process and never with the merits of the decision itself was exploded by the landmark [798] decision of this court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.
>
> … An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, does not, in our view, occasion an abuse of judicial power by an unjustified or unauthorized assumption of appellate power in certiorari proceedings.
>
> … The learned judge was therefore entitled … indeed, he was under a duty — to carry out an objective examination of the factual matrix presented to the Industrial Court to ascertain whether a reasonable tribunal similarly circumstanced would have come to the like conclusion.

[34] Some fetters were placed to the broad proposition by the Court of Appeal in the case of *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1, where again Gopal Sri Ram JCA stated (at p 4):

> It is well-settled that a court cannot utilize certiorari proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v Nagappa* AIR 1954 SC 440 and in *Dharangadhra Chemical Works Ltd v State of Saurashtra & Ors* AIR 1957 SC 264 …
>
> In response to this proposition, Mr Sivabalah refers us to the decision of this court in*Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 2 AMR 1653; [1997] 2 CLJ 79; [1997] 1 MLJ 750 and the decision of the Federal Court in *Rama Chandran*. I am conscious of the inroad made by these decisions in the field of administrative law. The principle they establish is that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness, the inquiry extends to the merits of the decision itself. The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran* and *Amanah Butler* may be, it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.

[35] Later, some concession was made by the learned judge of the Court of Appeal in *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372 to the effect that the above passage should have been 'more happily worded.' In *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750, Gopal Sri Ram JCA theorised that when an inferior decision is challenged on the basis of *Wednesbury* unreasonableness' then this would involve an 'examination of the merits of the case.'

[36] In respect of procedural fairness a new head for judicial review emerged under the name 'substantive fairness' in the case of *Tan Tek Seng*, where the court asserted 'procedure fairness' is a requirement, pursuant to art 8(1), read together with art 5(1) of the Federal Constitution. Further development took place in *Sugumar*

Balakrishnan where Gopal Sri Ram JCA said that the duty to act fairly is recognized to comprise two limbs viz. procedural fairness and substantive fairness. Procedural fairness, he said, requires that when arriving at a decision, a public-decision maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of. It follows that if, in arriving at a public law decision, the decision maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance. However, it was not approved in that manner by the Federal Court on appeal in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & Anor Appeal* [2002] 3 MLJ 72. The Federal Court there overturned the decision of the Court of Appeal and held, inter alia, that the doctrine of substantive fairness cannot be invoked as a separate or additional ground of judicial review of an administrative decision with Parliament having excluded judicial review under the Act (Immigration Act 1959/63). It held that it is not permissible for the courts to intervene and disturb a decision that statutorily cannot be reviewed on the basis of a new amorphous and wide ranging concept of substantive unfairness which even the English courts in common law have not recognized. This proposition would appear to be in stark contrast to the proposition in *R Rama Chandran*'s case. and also where Edgar Joseph Jr FCJ has gone to the extent of stating that:

> … and so it would be wrong to assume that the powers of our courts in the field of Public Law remedies is limited in the same manner as that of the courts in the UK where there are no such equivalent provisions …

[37] Further, in the advancement of law in the right perspective, the doctrine of inherent jurisdiction has been given great dimension in civil cases. In the case of *Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd* [2002] 1 MLJ 385, the Federal Court stated (at p 401):

> Where there is a clear case of injustice committed, the Federal Court, as the apex court in the land, cannot stand idly by doing nothing. It cannot and should not shrink from its responsibility of preventing injustice in appropriate cases. It must deal with it …
>
> … the Federal Court also has inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s 3(1)(a) Civil Law Act 1956, which was promulgated in accordance with cl (c) of art 121(2) Federal Constitution which confers on the Federal Court 'such other jurisdiction as may be conferred by or under federal law'.

[38] The Federal Court, in *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 2 MLJ 101, in an unprecedented manner has taken the doctrine of inherent jurisdiction to greater heights in criminal proceeding when Augustine Paul FCJ held that under r 137 of the Rules of the Federal Court 1995, the Federal Court has inherent powers to hear any applications, to make any orders as may be necessary to prevent injustice or to prevent an abuse of the process of courts.

[39] As a result of the above cases, in my view as regards to the issue of *locus standi* in public law challenges, there appears to be a departure, for *locus standi* in judicial

review has been a condition precedent before a party can initiate an action. A party may have a cause of action but if he has no *locus standi* to initiate the action the court will dismiss the action in limine. In *United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12, Salleh Abas LP observed (at p 20):

> Every legal system has a built-in mechanism to protect its judicial process from abuse by busy-bodies, cranks and other mischief-makers by insisting that a plaintiff should have a special interest in the proceedings which he institutes. This special interest is a nexus between him and the party against whom he brings his complaints to court and is known as 'locus standi'.

Abdul Hamid CJ observed (at p 27):

> 'Locus standi' is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have *locus standi*, in effect standing to sue in a court of law, if that court recognizes his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant. Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney-General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.

Seah SCJ observed (at p 33):

> The Latin phrase *locus standi* as used by the courts in England, or 'standing in courts' as the term is commonly understood by the lawyers in the United States of America, seems to indicate that a person is allowed by the judges to appear and be heard in a legal proceeding. It is a procedural barrier erected by the judges to prevent the court's time and public money from being wasted by multiplicity of frivolous and vexatious litigations brought by busybodies whose actions are bound to fail in limine and also to prevent abuse of the legal process... *In short, the rule as regards 'locus standi' or 'standing in courts' is not governed by any statutory enactment but is a rule of practice and procedure laid down by the judges in the public interest. Like all rules of practice, they are liable to be altered by the judges to suit the changing times.* (Emphasis added.)

[40] In consequence of the development and scope of inherent jurisdiction, it will appear that the *locus standi* test is no more the *sine quo non* to seek judicial review. It may be sufficient if the litigant is able to demonstrate injustice and seek orders from the court to prevent injustice.

[41] From the above cases, it can be said that the doctrine of judicial review is now a vibrant concept to meet public law challenges but such a challenge must be grounded by at least *bona fide* grievance against the decision maker as disclosed in the facts of the above cases and is not meant to entertain frivolous and vexatious applicants to usurp the Government or public authorities or alike from proceeding with their lawful functions as demonstrated in this case. I have read in detail the application, affidavits and submissions filed herein. I take the view that the applicant's application and the argument put forward is misconceived, lacks legal

jurisprudence, and is an attempt to scuttle a public interest project purely on monetary grounds and/or to put pressure on the concerned parties by way of this judicial review application, with knowledge that there will be substantial loss and damage to the second and third respondents. My reasons are as follows:

(a) The applicant's complaint is grounded on and originates from the fact that it is the obligation of the third respondent to purchase the land and in consequence the first respondent ought not to have acquired it for the benefit of the second and third respondents and as a result it is null and void. This is not a ground for judicial review as it does not fall within any of the heads of judicial review which I have mentioned earlier and in consequence this ground is mischievous. Further, the applicant was also attempting to sell the said land to the third respondent, which did not materialise on such facts and motive an argument based on art 13 of the Federal Constitution must fail when the acquisition is lawful. I also do not find any injustice done to the applicant by the first respondent for the court to intervene on its own motion to address the wrong and provide the remedy.

(b) Secondly, the applicant complains that it is not for public purpose and in consequence it is null and void, without identifying in the application or submission, under which head of judicial review the applicant is relying ie, whether it is *Animismic* error '*Wednesbury* unreasonables', or '*Rama*'s remedies', (see case of *R Rama Chandran*), etc.

(c) The applicant's puny arguments that it is not for public purpose, relying on s 3 LAO to be read with s 2, does not replicate the object and intent of the legislature. Public purpose is statutorily defined in s 2, and it is not a comprehensive definition and it also does not encompass all heads of public purpose. It only attempts to set out what may amount to public purpose. Public purpose in s 2 in my view appears to be like a generic term and the species are set out in the definition as far as possible. Further, public purpose or use or benefit will necessarily include living persons, statutory bodies etc, which may obtain a benefit as any ordinary member of the public could have done. For example, electricity is necessary for the purpose of lighting the house as well as a factory belonging to a corporation. Both purposes whether house or factory must necessarily be seen as public purpose as it benefits the public. Thus, the final test for public purpose is that whether directly or indirectly the public benefits. For example, land cannot be acquired under s 3 LAO for the purpose of presenting to an individual person. Such an act will not pass the public purpose test, unless otherwise provided by the law. The public purpose test has been eloquently set out by Hashim Yeop A Sani J (as he then was) in *S Kulasingam* as 'whether the purpose serves the general interest of the community'. To this I will add that as long as the public directly or indirectly benefits from the decision made under s 3 in this case, public purpose criteria is deemed to have been satisfied, unless the facts warrant otherwise. It cannot by any stretch of imagination be argued that the ultimate user of electricity in this case is not the public. In consequence, I am inclined to accept the arguments of the respondents so much as it relates to public purpose, but I decline to accept the arguments that the conclusive evidence clause in s 3 is binding on the courts.

(d) Conclusive evidence clause like 'ouster clause' can always be a subject matter of challenge in court when it is abused. Ordinarily, the court must and will give proper recognition to the provisions of the statute in a literal sense as enunciated in the above cases, cited by the parties earlier within the parameters of statutory interpretation, unless the applicant can bring a complaint in any one of the heads of judicial review. Any scheme to say that the court has no jurisdiction or power to investigate or review any executive decision or like because of statutory prohibition is unacceptable and will not accord with doctrine of separation of powers which I have mentioned earlier and the advancement of the scope and doctrine of judicial review as enunciated in the case of *R Rama Chandran* where the learned judge of great distinction, Edgar Joseph Jr FCJ asserted that: 'I trust we have pointed the way to new horizons in the forward march of judicial review.'; and the development of law in respect of the courts inherent jurisdiction.

[42] In this case, the respondents say that the threshold requirement for leave for issuing an application for certiorari is not satisfied and leave ought not to have been granted. I have dealt with the principles relating to judicial review earlier and for reasons stated above, I am inclined to accept the arguments.

[43] Further, the third respondent prays for the order for stay to be set aside without any application before the court. I take it that setting aside that order given by another judge is academic at this stage for when the application is dismissed; the order for stay will be dissolved as of right. However, if the respondents have filed an application for stay on the grounds as alleged in their affidavits, then the court may have minded to set aside the stay. For, it is a cardinal principle that when ex-parte applications are made there is a duty for the applicant as well as counsel as officers of court to ensure that the affidavit in support is made in good faith and should not suppress material facts or mislead the court in a manner to obtain the order. In *Castle Fitness Consultancy Pte Ltd v Mauz* [1990] 1 MLJ 141, the court stated that where an ex-parte application is made, the plaintiff is not only obliged not to mislead the court, but in addition, he is under a duty to disclose to the court all matters which are within his knowledge which are material to the proceedings and which are or may be in favour of an absent party. A matter is regarded as material if it is a factor that the court will take into account in the exercise of its discretion. This duty in my view is more onerous in public law remedies as the orders of court may disturb the lawful functions of the government or public bodies as seen in this case. This will not accord with the doctrine of separation of powers which I had elaborated earlier and such state of affairs orchestrated by litigants and/or counsels as the case may be to scandalise the orders of court, must be severely dealt with for public good.

[44] Further, when dissolving a stay order, the court at common law has a general discretion to order for damages to be assessed upon an appropriate application, though it is not generally done in judicial review matters or public interest litigation. However, exceptions can be made when it warrants. As these issues are not set before me, I will not make an order but I find the applicant's application exceptionally unwarranted and the stay in my view may have stalled a project which will have benefited the public. Further, it may have also caused substantial damages to the

respondents which are matters only the respondents can address by way of a separate suit and not by a complaint in this case and that too by way of submission.

[45] In respect of costs, I do not think that in an application for judicial review or public interest litigation, costs should be awarded as a norm to the respondent in the event the application is dismissed. However, in this case, I take exception to the general rule and I am minded to order costs as I find the application as well as the stay order frivolous, vexatious and an abuse of process of the court and is further an attempt to demean public law remedies in the right perspective.

[46] For reasons stated above, I dismiss the applicant's application with costs to be paid to the respondents. The costs of the getting up fees for each respondent should not exceed RM20,000. If costs cannot be agreed, the respondents are at liberty to tax their costs accordingly. I hereby order so.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed